(21)

No. 99-1379

IN THE

Supreme Court of the United States

SEP 19 2000

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF RESPONDENT

DANIEL F. KOLB, CO-CHAIR
CHESTER T. LESTER, JR., CO-CHAIR
JOHN PAYTON, CO-CHAIR
NORMAN REDLICH, TRUSTEE
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
TERESA A. FERRANTE
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER, BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, Illinois 60604
(312) 263-0272

[Additional counsel listed on inside front cover]

BEST AVAILABLE COPY

ELAINE R. JONES
DIRECTOR-COUNSEL
THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 965-2200

JUDITH L. LICHTMAN
DONNA R. LENHOFF
NATIONAL PARTNERSHIP
FOR WOMEN & FAMILIES
1875 Connecticut Ave., N.W.
Suite 710
Washington, D.C. 20009

DENNIS C. HAYES
GENERAL COUNSEL
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF
COLORED PEOPLE
4805 Mt. Hope Drive
Fifth Floor
Baltimore, Maryland 21215
(410) 486-9191

MARCIA D. GREENBERGER
JUDITH C. APPELBAUM
NATIONAL WOMEN'S
LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

ANTONIA HERNANDEZ, PRESIDENT
VIBIANA ANDRADE,
VICE PRESIDENT, LEGAL PROGRAMS
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, California 90014
(213) 629-2516

JULIE GOLDSCHEID
YOLANDA S. WU
DINA BAKST
NOW LEGAL DEFENSE AND
EDUCATION FUND
99 Hudson Street, 12th Floor
New York, New York 10013
(212) 925-6635

Attorneys for Amici

September 19, 2000

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QUESTIONS PRESENTED

1. Whether Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, which excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," bars employers from enforcing imposed arbitration schemes under the Act?

2. Whether the Act permits enforcement, under the pretext of "arbitration," of unregulated dispute-resolution policies that prevent employees from effectively vindicating their rights, including imposition of biased arbitrators, shortening of the limitations period, unfair procedures, excessive forum fees and arbitrators' fees, and revocation or limitation of statutory remedies?

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization.

The NAACP Legal Defense & Educational Fund, Inc. (the "Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women.

The National Women's Law Center (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national non-profit civil rights organiza-

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[1]The position *amici* take in this brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

tion that uses the power of the law to define and defend women's rights.

SUMMARY OF ARGUMENT

The rush by employers over the past decade to impose unregulated arbitration on their employees warrants close examination of Congress's policy choice under §1 of the FAA to exclude "contracts of employment" from the Act's scope. In Part I of this brief, we highlight some of the more oppressive provisions of Circuit City's "Dispute Resolution Agreement." In Part II, we show the repercussions of this case for all federal and state employee-protective legislation.

Finally in Part III, we show that if the FAA applies to most employment disputes, the courts must shoulder the burden to assure that employees do not forgo substantive rights in arbitration. To safeguard their rights against employers, employees will often have to litigate twice: first to invalidate unfair or oppressive arbitration provisions, and second to reach the merits of their claims. This regime increases the burden on civil rights plaintiffs as well as the courts, at odds with Congressional intent that such claims be facilitated. To enforce arbitration of employment law claims, courts must at a minimum insist upon elements that would preclude the abuses detailed below. Many current policies, including Circuit City's, fall well short of these due process standards.

ARGUMENT

I. Circuit City's "Dispute Resolution Agreement" Exemplifies the Peril of Unregulated, Imposed Arbitration in the Workplace

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-33 (1991), arbitration between a sophisticated employee (a stockbroker) and his employer was enforced because it was

governed by a U-4 registration, backed by a panoply of procedural safeguards and regulatory oversight by the SEC. By contrast, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), arbitration under a collective bargaining agreement ("CBA") did not bar a Title VII judicial forum, because the plaintiff did not herself consent to waive her right to suit, and had no control over the arbitration. Circuit City's unconsented arbitration policy falls on the *Alexander* side of the line.[2]

The Circuit City "Dispute Resolution Agreement" and "Dispute Resolution Rules and Procedures" ("DRA," J.A. 19-39) have often been litigated.[3] Some courts have refused to compel arbitration under the DRA because it caps back pay and punitive damage awards below federal limits (DRA Rule 32, J.A. 35-36).[4] As one judge wrote: "Punitive damages and back pay are powerful deterrents to employers who might otherwise

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[2] *See also Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80 (1998) ("*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA")

[3] *See, e.g., Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998), *following remand*, 203 F.3d 821 (4th Cir.), *cert. denied*, 120 S. Ct. 2744 (2000); *Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999); *Sportelli v. Circuit City Stores, Inc.*, No. CIV. A. 97-5850, 1998 WL 54335 (E.D. Pa. Jan 13, 1998). The company has also filed a declaratory judgment action against the EEOC to establish the legality of the company's compulsory arbitration program, a complaint ultimately dismissed on jurisdictional grounds. *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491 (E.D. Va. 1999).

[4] The DRA awards back pay "only up to one year from the point at which the Associate knew or should have known of the events giving rise to the alleged violation of law," and caps punitive damages at 100% of back and front pay (if any) or $5000. This provision contradicts Title VII, which provides two years' back pay (42 U.S.C. § 2000e-5(g)(1)), and section 1981, which does not cap punitive damages (42 U.S.C. § 1981a(b)(4)).

discriminate on the basis of race. The failure of the Circuit City arbitration provision to provide those remedies shields Circuit City from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights."[5]

Other provisions of the DRA (1) require employees to pay one-half the cost of arbitration, and allow shifting of all arbitration fees and costs to losing employees (DRA Rule 30, J.A. 33-34); (2) revoke presumptive and even mandatory statutory awards of attorneys' fees, committing such awards to broad arbitral discretion (DRA Rule 31, J.A. 34-35); (3) set a blanket one-year limitations period for all claims, irrespective of longer statutes of limitations (DRA Rule 6(a); J.A. 23-24); (4) impose the terms of the DRA only upon employees, leaving Circuit City's right to sue its employees in court unimpeded (DRA Rule 2, J.A. 20-21); (5) reserve the company's power to amend the DRA periodically, without requiring the approval of any public regulatory agency or the employees (DRA Rule 37, J.A. 37-38); and (6) declares—in case any provision be found unenforceable—a non-acquiescence rule, allowing Circuit City to enforce it elsewhere (DRA Rule 36, J.A. 37).[6]

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[5] *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.), *cert. denied*,120 S. Ct. 2744 (2000); *Gannon v. Circuit City Stores Inc.*, No. 4:00CV330 JCH, 2000 U.S. Dist. LEXIS 12125 at *9-11 (E.D. Mo. July 10, 2000) (caps on remedies prevent worker from "effectively vindicating" rights). *Cf. Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000) (striking out DRA caps on damages).

[6] Circuit City has left itself an alternative if the Court finds that the FAA does not apply to contracts of employment. The DRA separately provides that its terms may be enforced under the Uniform Arbitration Act of Virginia, VA. CODE ANN. § 8.01-581.01 *et seq.* (DRA Rule 34, J.A. 36-37). The Virginia Act, unlike the FAA, applies expressly to employment cases. *Id.* But the California Supreme Court held just a month ago that arbitration of claims under the state's Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* (such as this case) are subject to rigorous due process standards. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000).

All of these provisions redound to Circuit City's advantage, and this is no accident because the company set the terms unilaterally. Respondent had to "consent" to the DRA as a mandatory condition of applying to work (J.A. 11). Circuit City's DRA is a far cry from the intention—announced by the Court in *Gilmer*, 500 U.S. at 26—that employees under arbitration policies would not "forgo the substantive rights afforded by" state and federal labor and employment laws.

II. The Court's Interpretation of Section 1 of the FAA Will Affect All Employee-Protective Legislation

To interpret the exclusion in §1 of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," the Court must place the FAA against the backdrop of numerous federal laws enacted since 1925 protecting workers' rights. It is appropriate for the Court to consult such subsequent enactments here, as it did in last Term in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). There, the Court relied upon tobacco legislation passed by Congress subsequent to the Food, Drug, and Cosmetics Act: "At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The 'classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* at 1306 (citation omitted). As the Court construes the §1 exclusion in the FAA, it must harmonize this section with a

body of national laws regulating employment of persons in interstate commerce.

A. Since 1925, National Regulation of Employment Has Become Commonplace

Congress enacted the FAA in 1925 against a legal backdrop of minimal federal regulation of employment.[7] The Court declared unconstitutional — as exceeding Congress's commerce clause powers — laws banning "yellow dog" contracts and child labor. *See Adair v. United States*, 208 U.S. 161, 179 (1908) (no connection between interstate commerce and membership in a labor organization), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (no regulation of "local matters" by prohibiting movement in interstate commerce"), *overruled by United States v. Darby*, 312 U.S. 100 (1941); *Howard v. Illinois Central R. Co.*, 207 U.S. 463, 504 (1908) (striking down Employers' Liability Act because provisions applied to all employees of common carriers, even if they did not work directly in interstate commerce). Obversely, the Court upheld federal labor laws directly incident to regulating interstate common carriers, such as railroads.[8]

By the mid-twentieth century, when Congress reenacted the FAA (July 30, 1947, ch. 392, § 1, 61 Stat. 669), the federal role

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[7] Employment was considered primarily a local matter and the commerce clause was deemed to authorize Congressional action to protect workers only in the channels of interstate commerce.

[8] *See, e.g., New York Central R. Co. v. Winfield*, 244 U.S. 147, 148 (1917) ("[i]t is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce"); *Wilson v. New*, 243 U.S. 332, 349 (1917) (finding eight-hour-day law for interstate rail workers to fall within Congress's power "to deal not only with the carrier, but with its servants").

in labor relations had transformed dramatically. In the crucible of the Great Depression and the Second World War, Congress passed a host of statutes to protect workers' rights. *See, e.g.*, the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* (enacted 1932); Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (enacted 1947); Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (enacted 1938). These acts included a private right of action.[9] In addition, this Court in 1944 implied a cause of action for the breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 206-07 (1944). *See also Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (recognizing employee's individual right to sue employer along with union for breach of CBA under § 185 of the LMRA).

Against the backdrop of these new laws, courts were circumspect about applying the FAA to the workplace. *See, e.g., Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450 (1957) (applying § 185 of the LMRA to a CBA without mentioning FAA), *and id.* at 466 (Frankfurter, J., dissenting) (concluding that FAA did not apply to labor contracts). Even today—unacknowledged by the petitioners' brief (at 8, 11, 37-38)—courts continue to hold that CBAs are excluded from the FAA.[10] A contrary decision of this Court would work a major

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[9] *See* LMRA, 29 U.S.C. §§ 185, 187 (action for breach of CBA or for unfair labor practices); FLSA, 29 U.S.C. § 216(b) (action for violations of wage and hour laws).

[10] The Court noted in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 78 n.1 (1998), that the Fourth Circuit holds that the FAA does not apply to labor contracts. At least five federal courts of appeals so hold, even with contracts outside the transportation industry. *See, e.g., Posadas de Puerto Rico v. Association de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989) (hotels); *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993) (sugar growers); *Int'l Union of Electrical, Radio & Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889 (5th Cir. 1983),

and unknown transformation on this line of cases.

In the half-century since the re-enactment of the FAA, the federal role in employment matters has continued to widen. The legislative response to the 1960's civil rights movement blossomed into a series of statutes dedicated to the elimination of employment discrimination. *See, e.g.,* Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; Americans With Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* Employee benefits were also mandated and regulated on a national level during this period. *See, e.g.,* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*; Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*; Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* Each of these statutes created private rights of action. Before *Gilmer*, the lower courts viewed such statutes as the reserve of the judiciary and refused to compel arbitration of those claims.[11] This view found support in the Court's unanimous decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

B. In Non-Union Settings, Statutory Claims Are Increasingly Subjected to Unregulated Arbitration Schemes

The labor market quickly flooded with arbitration policies

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cert. denied, 466 U.S. 928 (1984); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988) (chemical workers); *United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943 (10th Cir. 1989) (supermarkets).

[11] *See, e.g., Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); *Nicholson v. CPC Int'l*, 877 F.2d 221, 227 (3d Cir. 1989); *Swenson v. Management Recruiters Int'l, Inc.*, 858 F.2d 1304, 1306-07 (8th Cir. 1988).

in the wake of *Gilmer*,[12] often appearing as boilerplate in job applications such as at Circuit City (J.A. 12-17).[13] These provisions are especially pernicious in low-wage, entry level jobs, where the applicant or employee has no bargaining power and lacks the legal sophistication even to know what to bargain about.[14] Arbitration has long been used at union shops as a substitute for strikes, (*Textile Workers*, 353 U.S. at 455), but unions, unlike individuals, know the dangers to avoid.

Since *Gilmer*, federal courts have become the beachhead of employers' nationwide campaign to privatize the resolution of employment disputes. In this case, plaintiff sued in state court under California's Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 *et seq.* (West 2000). This is the sort of legislation Congress meant to foster when it adopted the Civil

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[12] *See, e.g.,* Jenny Strasburg, *Proceeding Under Fire*, S. F. EXAMINER, April 30, 2000 at B1 (American Arbitration Association reports in 1999 having heard 1,950 employment arbitration cases nationally, 950 stemming from imposed arbitration policies and 300 involving Title VII claims); Michael A. Verespej, *Sidestepping Court Costs*, INDUSTRY WEEK, Feb. 2, 1998, at 68 (more than 400 employers, with a combined 4.5 million employees, have subscribed to some form of alternative dispute resolution for employment claims, mostly within the past two years); Leslie Kaufman and Anne Underwood, *Sign or Hit the Street*, NEWSWEEK, June 30, 1997, at 48 (noting that employers such as ITT, JCPenney, Brown & Root, and Renaissance Hotels adopted arbitration systems for employment disputes).

[13] With no little irony, Circuit City notifies applicants that they "may wish to seek legal advice before signing ," (J.A. 14) despite the folly in telling job aspirants to retain counsel before submitting a job application.

[14] *See EEOC v. Waffle House, Inc.*, 193 F.3d 805, 816 (4th Cir. 1999), *petition for cert filed*, 68 U.S.L.W. 3726 (May 1, 2000) (No. 99-1823) (King, J., dissenting) (employee who signed arbitration "agreement" was $5.50-an-hour grill operator); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 941 (N.D. Ind. 2000) (waiter at chain restaurant); *Sheller by Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997) (teenage cashiers). *Cf. Gilmer*, 500 U.S. at 33 (broker was sophisticated "businessman").

Rights Act.[15] *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 282-3 (1987) (noting "the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity"). Indeed, under California law, the DRA was likely unenforceable because of its limits on remedies and discovery. *Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000) (Mosk, J.). Circuit City responded with a federal-court action to enforce the DRA.

Despite Congress's express solicitude toward state civil rights enforcement, employers now use imposed arbitration policies as a shield against those very state laws, as well as other state employee welfare statutes.[16] The FAA has been held to preempt all contrary state laws regarding arbitration, so all state employee-protective statutes (even those that specifically preclude arbitration of employees' claims)[17] must bend to federal supremacy. *See, e.g., Doctor's Associates, Inc. v.*

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[15]*See* 42 U.S.C. § 2000e-5(b) to -5(f) (EEOC cooperation with State and local authorities); 42 U.S.C. § 2000e-7 ("[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . ."); 42 U.S.C. § 2000h-4 (disclaiming Congressional intent "to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter").

[16]*See, e.g., Miller v. Public Storage Management, Inc.*, 121 F.2d 215, 219 (5th Cir. 1997) (anti-retaliation claim); *Strawn v. AFC Enterprises, Inc.*, 70 F. Supp. 2d 717, 727-28 (S.D. Tex. 1999) (workers' compensation); *Young v. Prudential Ins. Co. of America*, 297 N.J. Super. 605, 622, 688 A.2d 1069, 1079 (App.Div.) (whistleblower statute), *cert. denied*, 149 N.J. 408, 694 A.2d 193 (1997); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1525, 60 Cal. Rptr. 2d 138, 140 (1997) (labor code).

[17]*See generally* Brief of the States of California, etc. as *Amici Curiae* in Support of Respondent (setting forth state laws barring or limiting arbitration of employment law claims).

Casarotto, 517 U.S. 681, 687 (1996). It has even been invoked to prevent a state civil rights agency from enforcing state law.[18]

Under federal law, the effects of imposed arbitration have been most pronounced in civil rights cases (e.g. Title VII, ADA, ADEA), but have also touched other statutes.[19] Its use intrudes upon a joint public/private mechanism for enforcing Title VII rights crafted by Congress. This joint mechanism (1) authorizes the EEOC to investigate and conciliate claims of discrimination, to interpret the law (42 U.S.C. §§ 2000e-5(b) and 2000e-12) and to litigate claims (*id.* § 2000e-5(f)(1)); (2) grants the Justice Department enforcement authority (*id.* §§ 2000e-5(f)(1) and 2000e-6); and (3) establishes a private right of action (*id.* § 2000e-5(f)(1)).[20]

This deliberate structure does not contemplate imposition of arbitration. Congress in 1991 authorized arbitration of discrimination claims "where appropriate" in the Civil Rights Act of 1991,[21] but never endorsed *imposed* arbitration policies

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[18]In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir. 2000), *petition for cert. filed*, August 25, 2000 (No. 00-317) the employer successfully enjoined, under the FAA, the Missouri Commission on Human Rights from proceeding with administrative action under state law on behalf of an employee who signed a Form U-4 to obtain monetary or equitable relief.

[19]*See, e.g., Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) (FLSA); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (ERISA); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 369 (7th Cir. 1998) (Equal Pay Act); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (FMLA); *Shaw v. DLJ Pershing*, 78 F. Supp. 781, 782 (N.D. Ill. 1999) (Section 1981).

[20] EEOC NOTICE, NO. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997) (http://www.eeoc.gov/docs/mandarb.html).

[21]The amendment authorizes, but does not require, alternative

such as Circuit City's, particularly unregulated schemes that seek to shield employers from the remedies enacted by Congress.[22] While this Court declined conclusively to interpret these provisions of the Civil Rights Act of 1991 in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 n.2 (1998), it declined to find an arbitration clause in a CBA, stating that "absent a clear waiver, it is not 'appropriate'. . . to find an agreement to arbitrate." Congress's insistence upon "appropriate" dispute resolution demands something more than acquiescence to imposed, unregulated arbitration policies.

III. Arbitration Programs Are Often Crafted to Relieve Employers of Legal Burdens, Rather than to Provide Employees a Fair Opportunity to Vindicate Substantive Rights

The FAA does not define"arbitration," but a respected treatise describes it as a "'simple proceeding voluntarily chosen by the parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.'" ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 5TH ED. at 2 (BNA 1996) (citation omitted). The

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dispute resolution (including arbitration) under Title VII, ADEA and the ADA. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991); 42 U.S.C. § 12212 ("where appropriate and to the extent authorized by law, . . . arbitration . . . is encouraged to resolve disputes arising under" these acts).

[22]The Ninth Circuit interprets these provisions affirmatively to preclude imposed arbitration under Title VII. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1190 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998). That court so far stands alone in its view. *See, e.g., Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 203-06 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 11 (1st Cir. 1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir.1998), *cert. denied*, 525 U.S. 1139 (1999).

reality in the workplace is far different. There is no sign that the FAA was meant to shield anything labeled "arbitration" regardless of voluntariness, impartiality, and fidelity to the law.

The *Gilmer* Court expected that arbitration would constitute only a change in forum, presuming that parties would "'not forgo the substantive rights afforded by the [ADEA].'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Supporters of arbitration thought that fair procedures would attract employees, leading to speedy resolutions.[23] The Court left to future, case-by-case development whether particular arbitral fora afforded employees a fair opportunity to present claims and obtain remedies. *Id.* at 31-32.

Contrary to these expectations, though, employers like Circuit City have subverted the concept of arbitration to pursue an agenda inimical to civil rights. The judicial task of policing these arbitrations is immense, given the employers' overwhelming temptation to draft their policies in a way that gives them an "edge" and limits their risk even if an employee manages to win, and in the absence of any administrative body with authority to curb such abuses. Employers are forcing workers to bear the costs of arbitration, suffer shortened periods of limitations, surrender rights to damages and attorneys' fees,

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[23] George Nicolau, past president of the National Academy of Arbitrators, observed that a voluntary arbitration system living up to the promise of *Gilmer* would attract employees who desired a prompt, inexpensive hearing of their claims. George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U.Pa. J. of Lab. and Employ. Law 175, 189-90 (1998). *See also* Ashlea Ebeling, *Better Safe Than Sorry*, FORBES, Nov. 30, 1998, at 162 (voluntary program for 65,000 United Parcel Service employees led to 197 claims, 75% resolved in program, and no lawsuits.)

or proceed under one-sided rules.[24] Such abuses led the National Academy of Arbitrators in 1997 to urge abandonment of imposed pre-dispute arbitration for employment discrimination claims.[25] Without regulatory safeguards, an "agreement" to arbitrate becomes an impermissible prospective waiver of civil rights. *Alexander*, 415 U.S. at 51-52 (Title VII rights "not susceptible of prospective waiver").

Even if courts oversee arbitrations, employees face an expensive, uphill battle to enforce their rights. Those wishing to challenge agreements must hire counsel, spend money, and endure extensive, extra-merits litigation just to win the right to start all over again in court. This runs contrary to the mandate of Title VII to expedite litigation of claims, and to waive filing fees, appoint counsel, and pay for attorneys' fees so that the

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[24]Commentators have written widely about the expansion of arbitration in the civil rights arena. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. L. J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L. J. 1 (1996); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment*, 16 Ga. St. U.L.Rev. 293 (1999); Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for Lai, Duffield and Rosenberg*, 4 Employee Rts. & Employment Pol'y J. 101 (2000); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395 (1999); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts for the 1990s*, 73 Denv. U. L. Rev. 1017 (1996); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 719-25 (1999).

[25]*Statement of the NAA on Individual Contracts of Employment and Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems*, May 21, 1997 (http://www.naarb.org/guidelines.html) (opposing "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights").

courts will be open to victims who could not otherwise afford to litigate their claims. *See* 42 U.S.C. § 2000e-5(f)(5).

Preemptive litigation may even be instigated by the employer. The Lawyers' Committee once represented a female employee at a Hooters restaurant, Annette Phillips, who was sued by her employer (the parent company, Hooters of America, or "HOA") for declaratory judgment to enforce its corporate arbitration policy against her then-pending sexual harassment claim. HOA filed its complaint on November 4, 1996. *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 588 (D.S.C. 1998). HOA moved for a preliminary injunction to restrain Phillips from filing any state or federal court action relating to her former employment, and to compel arbitration of her claims under the FAA, 9 U.S.C. § 4. *Id.* After briefing described as "extensive" and "voluminous" by the district judge (*id.* at 591), there followed discovery and a three-day evidentiary hearing, including expert witnesses testifying about the standards of fairness in arbitration and the operation and relative fairness of Hooters' arbitration agreement (*id.* at 592-93). Extensive findings in Phillips' favor were entered on March 12, 1998. *Id.* Over a year later, on April 8, 1999, the Fourth Circuit affirmed, in an opinion that excoriated the company's program as "utterly lacking in the rudiments of even-handedness." *Hooters of America v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999).[26] Thus, it took two and a half years

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[26]The Fourth Circuit affirmed findings of the district court that Hooters' rules allowed the employer exclusively to (1) avoid filing any written response to the employee's claim, (2) avoid disclosing its witnesses, (3) control the list of arbitrators, (4) expand the scope of the arbitration to include new claims against the employee, (5) move for summary judgment, (6) create a record at the arbitration, (7) bring suit in court to overturn the award based on a preponderance of the evidence, (8) cancel the arbitration agreement on 30 days notice, and (9) modify the procedures immediately without notice to the employee. *Hooters*, 173 F.3d at 938-39.

of hammer-and-tongs litigation just to restore the employee's right to bring a Title VII action.

Arbitration of employment law claims is distinctive. There is usually no union to safeguard the process. Unlike arbitration of claims in the securities field, as in *Gilmer*—regulated by the SEC (15 U.S.C. § 78s; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987))—there is no over-arching federal executive authority to oversee arbitration and no self-regulatory organizations authorized by statute. And unlike arbitration in the commercial and consumer fields, there is a certain predestination to employment cases: people can often avoid entering into installment contracts or buying software, but nearly every grown person has to work.

A. Employers Often Impose Arbitration Policies Without Employees' Knowing and Voluntary Consent

Employers usually impose arbitration unilaterally, by distributing employment manuals or written policies with arbitration provisions. Circuit City obtains its employees' "consent" to the DRA by making them sign an acknowledgment at the same time they apply for a job.[27] Some employers even conceal the details of the arbitration policy and fail to inform employees what rights they may be waiving.[28]

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[27] "Circuit City does not consider an application for employment unless the Dispute Resolution Agreement is signed." (Affid. of Pamela G. Parsons, Assoc. General Counsel to Circuit City, J.A. 11.) *See also Smith v. Chrysler Financial Corp.*, 101 F. Supp. 2d. 534, 537 (E.D. Mich. 2000) (arbitration policy described in brochure mailed to 18,000 employees); *McClendon v. Sherwin Williams, Inc.*, 70 F. Supp. 2d 940, 943 (E.D. Ark. 1999) (arbitration policy "communicated to employees by dissemination of the [employee] handbook," and employee accepted policy "by continuing to stay on the job").

[28] *See Rosenberg*, 170 F.3d at 19-20 (employer falsely certified

Courts in some cases have declined to enforce such imposed arbitration. In *Bailey v. Federal Nat'l Mortgage Assoc.*, 209 F.3d 740 (D.C. Cir. 2000), the court held that the plaintiff had not consented to arbitrate under the employer's new policy where he expressly disaffirmed it in writing shortly after the policy was adopted. The court looked askance at the argument that the employee accepted the policy by remaining in the defendant's employ, doubting that an employer "could terminate a current employee solely because of his or her refusal to accept the new arbitration policy." *Id.* at 746. In *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998), the court reversed summary judgment, finding that the policy in question made no explicit reference to arbitration or waiver and consigned the details of the program to a separate publication.[29] Yet other courts have upheld such policies, substituting the fictitious "consent" of continuing to work.[30]

Courts have also split over whether relinquishment of the federal judicial forum and jury right[31] requires a knowing and

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to court that it provided employee with a copy of NYSE rules); *Hooters*, 39 F. Supp. 2d at 611-12 (rules not disclosed). Circuit City's application (J.A. 13-18) nowhere declares those legal rights (such as rights to a jury trial, attorneys' fees, discovery, and damages) sacrificed by the DRA.

[29] *See also Smith*, 101 F. Supp. 2d at 539 (no mutual assent to policy); *Phillips v. Cigna Investments Inc.*, 27 F. Supp. 2d 345, 353-59 (D. Conn. 1998) (employee did not lose legitimate expectation to judicial forum by continuing to work after employer promulgated arbitration policy).

[30] *Bishop v. Smith Barney, Inc.*, No. 97 CIV. 4807(RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998) (enforcing arbitration clause in employee manual without individual assent; written company policy sufficient under FAA); *Leonard v. Clear Channel Communications I*, No. 972320-D/A, 1997 WL 581439 (W.D. Tenn. July 23, 1997) (enforcing unsigned, unacknowledged arbitration agreement in employment manual).

[31] *See, e.g.*, 29 U.S.C. § 626(c)(2) (jury trial authorized for ADEA cases); 42 U.S.C. § 1981a(c) (jury trial for Title VII and ADA cases seeking

voluntary waiver, or is governed instead by ordinary contract principles. Some circuits have applied a contract standard, holding that arbitration must be compelled except in cases tainted by fraud or coercion,[32] while other circuits remain on the fence.[33] But the Ninth Circuit, in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299, 1304-5 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), held that the "text and legislative history of Title VII" required that an employee "knowingly agree[] to submit such disputes to arbitration."[34]

The knowing and voluntary standard follows from the standard applied generally to the waiver of a civil jury trial.[35] A waiver standard also comports with the history of the Civil Rights Act of 1991. Section 118 of the Act approves, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including, . . .arbitra-

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compensatory or punitive damages).

[32]*See, e.g., Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 229-30 (3d Cir. 1997).

[33]*Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18 (1st Cir. 1999); *Halligan v. Piper Jaffrey Inc.*, 148 F.3d 197, 203 (2d Cir. 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129-30 (7th Cir. 1997).

[34]*See also Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760-61 (9th Cir. 1997) (applying *Lai* to ADA), *cert. denied*, 523 U.S. 1072 (1998); *Hooters*, 39 F. Supp. 2d at 612 (applying knowing and voluntary standard); *Penn*, 95 F. Supp. 2d at 950.

[35]*See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver"); *KMC Co. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (courts "overwhelmingly appl[y] the knowing and voluntary standard" to determine "the validity of a contractual waiver of [a civil] jury trial"); Grodin, *supra* note 12, at 36-9; Lopez, *supra* note 12, at 127-34.

tion."[36] The Seventh Circuit interpreted this provision in *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997), to hold that arbitration would not be "appropriate when it is not agreed to by the worker but instead is merely imposed" by a CBA. The *Pryner* court took a page from history, observing that "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury—a right that civil rights plaintiffs . . . fought hard for and finally obtained in the 1991 amendments to Title VII." *Id.* at 362. *Wright* left this question open.

B. Excessive Fees Deter Claims

Employers often try to shift some or all of the costs of arbitration to the complaining party. Rule 30 of Circuit City's DRA requires the parties to split fees 50-50 and authorizes the arbitrator to shift all arbitration fees and costs to the losing side. J.A. 33-34.[37] The prospect that an employee might have to

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[36]*See also* H.R. Rep. No. 102-40, Part I, 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635 (stating that this section was "intended to supplement, not supplant, the remedies provided by Title VII"); 42 U.S.C. § 12212 (same provision for the ADA).

[37] *Compare* Fed. R. Civ. P. 54(d)(1) and 28 U.S.C. § 1920 (authorizing shifting of narrowly enumerated costs). Arbitration costs can be steep. *See, e.g., Duffield v. Robertson Stephens & Co.* (9th Cir), Docket No. 97-15687, Appellant's Opening Brief at 34-36 (record of proceeding established that arbitrators in the securities field charge fees starting from $1000 per half-day, mounting up to $82,800 in one complex case, and such fees are imposed on each party.) *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997) (noting estimates for arbitrators fees in a typical employment case from $3,750 to $14,000); *Campbell v. Cantor Fitzgerald & Co.*, 21 F. Supp. 2d 341, 345 (S.D.N.Y. 1998), *aff'd*, 205 F.3d 1321 (2d Cir. 1999) (after thirty sessions over sixteen months, arbitrators rule against employee without written explanation and assessed employee $45,000 in hearing fees); Alleyne, *supra* note 12, at 410-11 (noting that arbitrators fees can run from hundreds to thousands of dollars); Edwards, *supra* note 12, at 306-07 (citing arbitrations where fees ran into tens of

deposit, on demand, thousands of dollars just for the privilege of arbitrating a claim will assuredly deter claims.[38]

Some courts bar companies from charging forum costs to the employee, striking down such agreements entirely.[39] Others simply sever such provisions from the agreement.[40]

Yet other circuits take the position that fee-splitting does not, standing by itself, invalidate an arbitration policy.[41] As the

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thousands of dollars).

[38] *See, e.g., Armendariz v. Foundation Health Psychcare Serv., Inc.*, No. S075942, 2000 WL 1201652 (Cal. Aug. 24, 2000) ("[t]he payment of large, fixed, forum costs, especially in the face of expected meager awards, serves as a significant deterrent to the pursuit of [civil rights] claims").

[39] *See, e.g., Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 163 F.3d 1230, 1234-34 (10th Cir. 1999) (contract requiring plaintiff to shoulder one-half of arbitrator's fee, between $1,875 and $5,000, held unenforceable); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (refusing to compel arbitration under contract that imposed "hefty" arbitration costs and "steep filing fees" on employee); *Davis v. LPK Corp.*, 76 Fair Empl. Prac. Cas. (BNA) 954 (N.D. Cal. 1998) (invalidating agreement where employee had to bear one-half of the arbitrator's fee).

[40] *See, e.g., Fuller v. Pep Boys — Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158, 1162-63 (D. Colo. 2000); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999). Still others interpret the offending sections equitably to relieve the employee's burden. *See, e.g., Cole*, 105 F.3d at 1485 (court interprets fees provision from agreement to apply only to employer); *McWilliams v. Logicon, Inc.*, No. CIV. A. 95-2500-GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997) ($1,300 fee shifted to employer), *aff'd*, 143 F.3d 573 (10th Cir. 1998).

[41] *See, e.g., Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 763 (5th Cir. 1999), *cert denied*, 120 S.Ct. 1833(2000). (approving apportionment of one-half of forum fees, $3,150, on employee); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 16 (1st Cir. 1999) (holding that prospect of fee-splitting did not render policy

D.C. Circuit held in *Cole*, 105 F.3d at 1485, a plaintiff "could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses." Indeed, "there is no reason to think that the [*Gilmer*] Court would have approved a program of mandatory arbitration of statutory claims . . . in the absence of employer agreement to pay arbitrator's fees." *Id.* at 1468.

This Court recently granted certiorari in *Green Tree Financial Corp.-Alabama v. Randolph*,178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000), a case raising the fee issue under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* and the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* The loan company admitted that decisions regarding apportionment fees and costs would be entirely in the discretion of the arbitrator, and such uncertainty led the court below to find the arbitration clause unenforceable. To require a plaintiff, especially an impecunious one, to amass a reserve of thousands of dollars just to commence a claim sacrifices substantive rights, and would lead to the wholesale abandonment of claims. How much worse, then, are policies such as Circuit City's that *explicitly* shift the burden to employees?

C. Employers Have Revoked Legal Remedies

In *Gilmer*, the Court particularly noted that the New York Stock Exchange ("NYSE") rules did "not restrict the types of relief an arbitrator may award." 500 U.S. at 32. *See also Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 205 (2d Cir. 1999), *petition for cert filed*, 68 U.S.L.W., 3497 (Jan. 31, 2000)(No. 99-1285) (reaffirming need for full set of

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unenforceable); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 362 (7th Cir. 1999) (allowing fee-splitting).

statutory remedies under Title VII in arbitration). A full panoply of remedies and statutory safeguards are essential to deter and remedy employment discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

Yet employers have sought to whittle down statutory remedies through artful and unequal crafting of arbitration agreements. Circuit City's DRA caps back pay and punitive damage awards below federal limits (J.A. 35-36); makes the award of attorneys' fees wholly within the discretion of the arbitrator[42] (J.A. 34-35); and chops down the limitations period to one year (J.A. 23-24). Other employers have likewise limited employees' remedies.[43]

Indeed, Circuit City's decision to cap the limitations period at one year regardless of the claim directly implicates the employees' substantive rights. Employer torts and statutory violations can carry longer statutes of limitations.[44] In Mr.

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[42] *See Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 261 n.34 (1975) (noting that under section 16(b) of the FLSA, 29 U.S.C. § 216(b), which also governs ADEA, award of fees to prevailing party is "mandatory"); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-417 (1978) (under § 706(k) of Title VII a prevailing plaintiff ordinarily is to be awarded attorney's fees in all but very unusual circumstances).

[43] *See Paladino*, 134 F.3d at 1060-62 (policy provides only for contract damages); *Hooters*, 39 F. Supp. 2d at 612 (policy prevented full recovery of damages and attorneys fees); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 464-70 (S.D.N.Y. 1997) (policy barred award of statutory attorneys' fees); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996) (policy did not provide full range of Title VII damages).

[44] See, e.g., *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Pgm.*, 2000 WL 1022713 (9th Cir. July 26, 2000) (*en banc*) (four-year statute of limitations for actions on written contract applies to ERISA action to recover disability benefits under written contractual policy

Adams' case, he would not necessarily have been required to commence a FEHA action within a year, because the timely filing of a charge tolls the limitations period. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 902 (9th Cir. 1994) (limitations period for plaintiff's FEHA claim tolled for more than four years during EEOC's investigation). But the DRA trumps all such rules. *See Stirlen v. Supercuts Inc.*, 51 Cal. App. 4th 1519, 1542, 60 Cal. Rptr. 2d 138 (1st Dist. 1997) (finding comparable one-year limitation on employees' claims under arbitration agreement unconscionable under California law).

Courts have even given tacit approval to this approach, determining that such terms—despite falling short of statutory norms—may be enforced by an arbitrator. In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), the arbitration agreement included provisions waiving the employee's right to attorneys fees and punitive damages. The court referred the matter to arbitration to determine whether the plaintiff had agreed to abandon statutory rights. *Id.* at 231-32.[45]

By referring these matters to arbitration, these courts may have simply deferred litigation until the time to enforce the award, contrary to the expectation that arbitration should afford prompt and inexpensive relief. *Pryner*, 109 F.3d at 362 (noting the "spectre" of satellite litigation). The promise of such review may prove ephemeral, as we shall see in section E below.

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in California).

[45] *See also Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 187-88 (3d Cir. 1998) (reserving disputes over alleged inadequacies or unfairness of agreement to arbitrator); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir.1996) (directing ADEA plaintiff to pursue his unconscionability claim with the arbitrator); *Kinnebrew v. Gulf Insurance Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189, 191 (N.D. Tex. 1994) (referring claim to arbitration under policy that bars punitive damages, injunctive relief and attorneys fees).

The *Gilmer* Court also assumed that the EEOC would be available as a backstop to private arbitration policies. "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer*, 500 U.S. at 28. But some courts hold that arbitration policies preclude (in varying degrees) even the government from obtaining relief on behalf of the employee.[46]

Against these cases, the Sixth Circuit has held that an arbitration agreement has no collateral effect on the EEOC and that it may independently seek to vindicate and remedy violations of civil rights.[47] This Court has already noted that the Commission represents the public at large, not individual victims of alleged discrimination in its suits. *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980). The Court should avoid an interpretation of the FAA that derogates the EEOC's and parallel state civil rights agencies' independent, public roles in enforcing anti-discrimination laws.

D. Arbitration Often Fails to Provide Fair and Accountable Procedures

Gilmer established that arbitration may substitute for civil

[46] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir. 2000) (barring state agency from obtaining individual relief for complainant); *EEOC v. Waffle House, Inc.*, 193 F.3d at 812 (barring EEOC from litigating individual claim unless it was prepared to seek "large-scale injunctive relief" on behalf of entire class); *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 302 (2d Cir. 1998) (barring EEOC from obtaining monetary damages).

[47] *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458-59 (6th Cir. 1999). *See also Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000) (dismissing company's petition to compel arbitration where plaintiff's only action was to file charge with EEOC).

litigation only when the arbitral forum affords fundamental procedural protections. 500 U.S. at 30-32.[48] But as long as employers are free to impose arbitration on employees, they can pile on onerous terms while shackling employees to them:

1. *Employers refuse to bind themselves to procedures that employees must follow.* Rule 2 of the DRA says that "claims of an [employee] . . . shall be settled exclusively by final and binding arbitration," but no reciprocal provision applies to the company. J.A. 20-21; *Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998) (DRA " does not appear to require the arbitration of any claims Circuit City might have against Johnson").

2. *Employers reserve to themselves the power to alter the procedures at their discretion.* Under DRA Rule 37 (J.A. 37-38), "Circuit City may alter or terminate the Agreement" at the end of each calendar year merely by tendering 30 days' written notice to employees. *See also Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (employer "reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from," employees); *Hooters*, 173 F.3d at 938-39 (same).

3. *Absence of neutral arbitrators.* *Gilmer* authorized

[48] *See A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, May 9, 1995 (http:// www.naarb.org/protocol.html) (signed by representatives of the National Academy of Arbitrators, the American Arbitration Association, the Labor and Employment Law Section of the American Bar Association, and other organizations). *See also* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-at-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. Rev. 443, 489-90 (1995) (enforceable arbitration system would have to include right to counsel, adequate discovery, mutual selection of arbitrator, ability to call witnesses, and anti-retaliation commitment to cooperating witnesses).

arbitration against a backdrop of NYSE rules that provided for disclosure of the arbitrator's professional backgrounds, a right to strike arbitrators, and a duty upon arbitrators to disclose potential conflicts. 500 U.S. at 30. Yet some policies have given employers nearly unfettered control over who shall sit as arbitrators. *See, e.g., Hooters*, 173 F.3d at 941 (employer made up list of arbitrators itself); *Penn*, 95 F. Supp. 2d at 945-48 (employer's agent controlled who appeared on the lists of arbitrators).

4. *Arbitrary limits on discovery*. The NYSE rules under review in *Gilmer* expressly provided for "document production, information requests, depositions and subpoenas," sufficient to afford a "fair opportunity" for employees to present their claims. 500 U.S. at 31. But other policies have omitted such procedures. Circuit City, for instance, authorizes only three depositions as opposed to the ten depositions ordinarily allowed in Federal court. *Compare* J.A. 26-27, DRA Rule 13(b), *with* Fed. R. Civ. P. 30(a)(2)(A). *See also Hooters*, 173 F.3d at 938 (employer had no obligation to provide lists of witnesses or respond to plaintiff's written claim); *Penn*, 95 F. Supp. 2d at 948-49 (finding discovery provisions "severely limited"). Because employees typically know less about an employment decision than the employer itself, arbitrary limits on discovery may doom their claims.

5. *Secrecy of arbitration decisions*. Arbitration awards are typically confidential (*see* J.A. 31, DRA Rule 23),[49] and courts have not generally required arbitrators to memorialize their

[49] *See Code of Professional Responsibility for Arbitrators of Labor Management Disputes*, art. II, § C(1)(c) (making it a "violation of professional responsibility for an arbitrator to make public an award without consent of the parties"), *reprinted at* Jay E. Grenig, 26 *West Legal Forms: Alternative Dispute Resolution*, App. 11C at 770 (1995).

findings in writing.[50] By contrast, district courts must issue findings of fact and conclusions of law as a public record. *See* Fed. R. Civ. P. 52(a).

The publication of decisions in the civil rights field guides employees and employers alike about what conduct is lawful.[51] Conversely, cutting off publication of decisions impedes voluntary efforts to comply with the law.[52]

E. Judicial Review of Arbitration Awards Is Minimal

Gilmer recognized that judicial review was a corrective to errant arbitrators. 500 U.S. at 30-31. Yet the awards of commercial and labor arbitrations, based on interpretation of agreements freely bargained by the parties, have long been accorded deferential judicial review. *See, e.g., United Steelworkers*, 363 U.S. at 597-99 (where arbitrator's award concerns construction of CBA, court lacks authority to overrule the arbitrator's interpretation); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 n.4 (1956) (no review of arbitrator's

[50] *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 976 n.8 (1960) ("[a]rbitrators have no obligation to the court to give their reasons for an award"); *Green v. Ameritech Corp.*, 200 F.3d 967, 974-76 (6th Cir. 2000) (affirming award in state law civil rights case that lacked findings and conclusions, even though arbitration policy expressly required arbitrator to "explain" decision).

[51] *Gilmer*, 500 U.S. at 31-32 (enforcement of U-4 would not hurt civil rights enforcement because NYSE rules require written and publicly available arbitration awards, and because "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements").

[52] *See* Moohr, *supra* note 12 (stressing the public goal of eradicating employment discrimination over simple goal dispute resolution in individual discrimination cases); Van Wetzel Stone, *supra* note 12, at 1043-47 (discussing educational function of civil rights opinions); Adriaan Lanni, *Protecting Public Rights in Private Arbitration*, 107 Yale L. J. 1157, 1160-61 (1998) (encouraging disclosure of arbitration decisions).

error in interpreting contract). This area must be reevaluated in light of the expansion of imposed arbitration into the civil rights arena.

Review of arbitration awards of statutory claims, as the Court reminds us, must rise to a level "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232. *See Gilmer*, 500 U.S. at 32 n.4 (same point in context of ADEA). The proper level of review, according to the Court, must be higher in a case reviewing a statutory claim than in one reviewing a garden-variety labor dispute; in the latter case, arbitrators have "authority only to resolve questions of contractual rights." *Id.* at 34. *See, e.g., McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) (rejecting suggestion that arbitration can "provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard"); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) ("[w]hile courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers").

It is widely known that arbitrators often do not apply the law and follow their own precepts of fairness. *See, e.g.* Ware, *supra* note 12, at 719-25 (summarizing empirical research and case law supporting this conclusion); Van Wetzel Stone, *supra* note 12, at 1040 (citing Congressional study that most arbitrators in the securities industry had no background in labor and employment law). Most arbitrators lack legal training, do not keep up with legal developments and lack accountability for their decisions. *See* Edwards, *supra* note 12, at 297-98.

Moreover, the degree of scrutiny that awards presently receive for legal error is feather-light, curtailing even further the incentive to follow the law. Under the FAA, courts may only review legal errors for "manifest disregard of the law." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995) (noting "manifest disregard" standard). Manifest disregard focuses not on legal error *per se*, but on the narrower issue of whether the arbitrator deliberately defied the law. Typical is the Eleventh Circuit's recent decision in *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997), holding that reversal of an award for manifest disregard of the law requires proof that the arbitrator was "conscious of the law and deliberately ignore[d] it." *See also Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000) (reaffirming that application of wrong legal test in race discrimination case must be "intentional" or "conscious" to be reviewable as "manifest disregard"). Other circuits apply equally stingy standards of review.[53] If the arbitrator issues no written opinion, or a one-sentence award (and thereby leaves no record of what legal standards were followed), it leaves nothing for the court to review and insulates the award from reversal. Ware, *supra* note 12, at 721 ("[i]n most cases in which an arbitrator does not apply the law, it will be virtually impossible

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[53] *See, e.g., Williams*, 197 F.3d at 761-72 (summarizing law); *Kiernan v. Piper Jaffray Cos., Inc.*, 137 F.3d 588, 594 (8th Cir. 1998) (applying deferential "manifest disregard" standard to civil rights case); *DiRussa v. Dean Witter Reynolds Inc.*,121 F.3d 818, 821 (2d Cir. 1997) (applying deferential standard to affirm award that where employee prevailed, but arbitrator awarded no attorneys' fees), *cert. denied*, 522 U.S. 1049 (1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 136 (6th Cir. 1996) ("[a]n arbitration panel only acts in manifest disregard of the law if the applicable legal principle is clear and well-settled and it refuses to follow that legal principle"); *Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 224-29 (S.D.N.Y. 1997) (rejecting argument for heightened scrutiny of judicial review in civil rights cases).

for a court to discover that the arbitrator did not apply the law"). Standing against this tide is the approach taken by the D.C. Circuit in *Cole*. While noting that courts ordinarily defer to arbitrator's awards, the court held that the manifest disregard standard is somewhat elastic and "must be defined in light of the bases underlying the Court's decisions in *Gilmer*-type cases." *Cole*, 105 F.3d at 1487. As the court noted:

> The nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims. In this context, the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law. [*Id.* at 1468-69.]

Thus, "there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct." *Id.* at 1487. *See Halligan v. Piper Jaffrey Inc.*, 148 F.3d 197, 204 (2d Cir. 1997) (vacating for "manifest disregard" award for employer in civil rights case); *DeGaetano*, 983 F. Supp. at 462-64 (failure to award attorneys' fees to prevailing plaintiff after award was requested was in manifest disregard of the law).

CONCLUSION

For the foregoing reasons, the undersigned *amici* respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

Daniel F. Kolb, Co-Chair
Chester T. Lester, Jr., Co-Chair
John Payton, Co-Chair
Norman Redlich, Trustee
Barbara R. Arnwine
Thomas J. Henderson
Richard T. Seymour
Teresa A. Ferrante
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, N.W., Suite 400
Washington, D.C. 20005
(202) 662-8600

Paul W. Mollica
Counsel of Record
Meites, Mulder, Burger & Mollica
208 South LaSalle Street
Suite 1410
Chicago, Illinois 60604
(312) 263-0272

Dennis C. Hayes
General Counsel
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Fifth Floor
Baltimore, Maryland 21215
(410) 486-9191

Elaine R. Jones
Director-Counsel
Theodore M. Shaw
Norman J. Chachkin
Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 965-2200

Antonia Hernandez, President
Vibiana Andrade, Vice-President, Legal Programs
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, California 90014
(213) 629-2516

Judith L. Lichtman
Donna R. Lenhoff
National Partnership for Women & Families
1875 Connecticut Ave, N.W.
Suite 710
Washington, D.C. 20009
(202) 986-2600

Marcia D. Greenberger
Judith C. Appelbaum
National Women's Law
Center
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

Julie Goldscheid
Yolanda S. Wu
Dina Bakst
NOW Legal Defense and
Education Fund
99 Hudson Street, 12th Floor
New York, New York 10013
(212) 925-6635

Attorneys for Amici

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